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Supreme Court, U.S.
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No. 04-668

IN THE

Supreme Court of the United States

DENNIS MCBRIDE and ROBERT O'MARA,

Petitioners,

—v.—

JOSE ORTIZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the administrative exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), requires that fully exhausted and meritorious claims be dismissed because the complaint initially contained an unexhausted claim that the plaintiff subsequently withdrew with prejudice.

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STATEMENT OF THE CASE

Petitioners[1] seek this Court's review of an interlocutory decision of the Second Circuit vacating and remanding the district court's dismissal of the Complaint[2] for failure to exhaust administrative remedies as prescribed by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Respondent Jose Ortiz, formerly a prisoner in Arthur Kill Correctional Facility in New York, was improperly convicted in October, 1998, of a prison disciplinary offense and sentenced to 90 days in the prison's Special Housing Unit (in substance, solitary confinement). His administrative appeal was granted, but only after he had served his entire term of punitive confinement. App. 3a-5a.

Mr. Ortiz brought a § 1983 action against Petitioners McBride, who lodged and prosecuted the disciplinary charges, and O'Mara, the hearing officer at the defective disciplinary

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[1] Although the Petition was filed on behalf of Dennis McBride and Robert O'Mara, in fact the claim against McBride was abandoned in the district court. *See* Pltff. Memo in Opposition to Motion to Dismiss at II (E.D.N.Y., Jan. 11, 2002).

[2] Defendants filed their answer on December 10, 2004.

proceeding, alleging that his disciplinary conviction denied due process and that the conditions of his confinement in the Special Housing Unit were so harsh as to violate the Eighth Amendment's prohibition against cruel and unusual punishments. App. 3a-6a. Mr. Ortiz had exhausted his administrative remedies as to the due process claim, but not as to the Eighth Amendment claim. App. 5a-7a, 9a-10a.

The district court granted Petitioners' motion to dismiss on the grounds, *inter alia*, that he had not exhausted one of his claims. App. 7a.

The Second Circuit issued a preliminary opinion noting that it had requested the appointment of counsel for Mr. Ortiz and directing that counsel brief, *inter alia*, "whether § 1997e(a) requires 'total exhaustion' and, if so, whether Ortiz may now withdraw any unexhausted claims." App. 8a.

In his opening brief in the Court of Appeals, Mr. Ortiz conceded that the Eighth Amendment claim could not go forward because he had not sued the correct defendants, and the expiration of the statute of limitations precluded him from curing the error. He therefore withdrew the claim with prejudice. Br. of Appellant at 17-18; *see* Petition for a Writ of Certiorari, Appendix ("App.") 9a; *see also* Br. of Defendants-Appellees at 29; Reply Br. of Appellant at 5.

Petitioners acknowledged in their appellate brief that the issue of total exhaustion thus was no longer presented in this case:

> In the typical case, application of the

> total exhaustion rule would mandate dismissal of a plaintiff's entire action, unless the plaintiff chose, as he should be allowed to do, to withdraw all unexhausted claims *with* prejudice. But here, plaintiff has conceded that his only remaining claim (his Eighth Amendment claim) is without merit. *See* Appellant's Br. at 17-18. This concession is tantamount to a withdrawal with prejudice.

Br. of Defendants-Appellees at 29. Respondent agreed that the claim was in effect withdrawn with prejudice. Reply. Br. of Plaintiffs-Appellants at 5. At oral argument, however, Petitioners' counsel argued that if an unexhausted claim had ever been part of the case, the PLRA required that the entire complaint be dismissed.

In its subsequent opinion, the court of appeals stated: "As we have noted, Ortiz now concedes that his Eighth Amendment claim is not viable in any event. That does not alter the fact that Ortiz 'brought,' *see* 42 U.S.C. § 1997e(a), a lawsuit presenting both an unexhausted claim and an exhausted claim." App. 14a, n.1. It held:

> At the end of the day, then, we do not think that requiring district courts to dismiss the entirety of any prison-conditions action that contains exhausted and unexhausted claims, and thereby requiring prisoners to institute their actions containing only the exhausted claims in federal court all over again, is a meaningful way to "reduce the quantity and improve the quality

> of prisoner suits," *Porter*, 534 U.S. at 524, or to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits," 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch). We therefore conclude that the presence of the unexhausted Eighth Amendment claim in Ortiz's complaint when he brought it did not require the district court to dismiss the action in its entirety.

App. 30a. The court of appeals also held that the plaintiff's allegation that his disciplinary proceeding deprived him of liberty without the due process of law stated a constitutional claim, App. 14a, a holding Petitioners do not challenge here. Therefore the court vacated the dismissal and remanded to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CLEAR OR SUBSTANTIVE CONFLICT IN THE CIRCUITS.

Petitioners argue that the Court should grant certiorari because of a perceived conflict between circuits on the question of "total exhaustion," *i.e.*, whether the presence of an unexhausted claim in a prisoner's civil suit requires dismissal of the entire complaint including properly exhausted claims. However, a review of the supposedly conflicting decisions makes clear that the "conflict" between circuits is minimal at

best, and likely does not exist at all.[3]

The court below held that if a prisoner's complaint contains unexhausted claims, those claims must be dismissed, and the exhausted claims should then go forward. Citing *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004), Petitioners say the Tenth Circuit requires that, if a prisoner's complaint contains both exhausted and unexhausted claims, the court must dismiss the entire complaint, after which the plaintiff may file a new complaint containing only the exhausted claims.

To begin with, the small procedural difference to which Petitioners point has little if any real world effect. The circuits agree that claims that have not been administratively exhausted may not go forward, but exhausted claims may. The difference is only in how the statutory command is enforced. Doctrinally, so minor a conflict simply does not merit require review by this Court.

Just as important, even this small difference is illusory. As Petitioners acknowledge (Pet. 6 n.2), in a decision after *Ross*, the Tenth Circuit held that the prisoner may simply dismiss his unexhausted claims and proceed with the exhausted claims. *West v. Kolar*, 2004 WL 1834634 (10th Cir., Aug. 17, 2004). In this more recent opinion, the Tenth Circuit explained that *Ross* had analogized to this Court's total exhaustion rule for

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[3] It is also academic in this case, since there is no longer an unexhausted claim in the case, that claim having been dismissed with prejudice at the outset of appellate proceedings. *See* Point II, below.

habeas corpus proceedings, *see Rose v. Lundy*, 455 U.S. 509 (1982), and that, under *Rose*, a district court may allow a prisoner plaintiff to dismiss his unexhausted claims and proceed with the exhausted claims. *West*, 2004 WL 1834634 at *2 (*citing Rose*, 455 U.S. at 510). Thus, the Tenth Circuit's most recent statement on the issue presented here is entirely consistent with the Second Circuit's decision.

Petitioners dismiss *West* on the ground that it is not binding precedent under Tenth Circuit rules, and they attempt to minimize it by characterizing the decision as "less than a rigorous application of *Ross*'s holding that a district court is 'required' to dismiss a mixed complaint without prejudice." Pet. at 6 n.2 (citation omitted). However, two members of the *West* panel, Judges Henry and Murphy, also sat on the *Ross* three-judge panel and joined the opinion in that case, which suggests that the *West* panel correctly understood the holding of *Ross*. Moreover, at least one district court in the Tenth Circuit has expressly followed *West*, declined to dismiss a prisoner's case because of unexhausted claims, and instead allowed the plaintiff to amend his complaint to assert only exhausted claims. *See Wolters v. Conner*, 2004 WL 2496699 at *3 (D.Kan., Nov. 4, 2004).

Like the Tenth Circuit, the Eighth Circuit at one time held, in a one-page per curiam opinion, that failure to exhaust as to one claim required dismissal of the entire complaint. *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000). Although the Tenth Circuit in *Ross* cited *Graves*, the Eighth Circuit has in fact reversed course since *Graves*, and has held that a district court abused its discretion in denying a prisoner's request to amend his complaint to omit unexhausted claims. *See*

Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8th Cir. 2003). Although Petitioners describe *Kozohorsky* as "reflect[ing] confusion," the opinion belies that characterization: The Eighth Circuit explicitly modified its rule, reaching the same results, and for largely the same reasons, as did the Second Circuit in this case.

Thus, no circuit now mandates what Petitioners seek: that pleading an unexhausted claim must result in dismissal of all claims and re-filing of exhausted claims. The divergence of views among circuits–minor to begin with–has converged to the point where the only arguable difference is between the Second and Tenth Circuits, who agree that voluntary dismissal of the unexhausted claims allows the exhausted ones to go forward, and the Eighth, which agrees, but specifically mentioned the filing of an amended complaint. That is not the stuff of which Supreme Court review is or should be made. This case is very much one where certiorari should be denied because there is simply no meaningful or important split in the circuits, and any minor differences will likely be resolved in the courts of appeals in future cases.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEW OF THE TOTAL EXHAUSTION QUESTION.

Petitioners argue that a total exhaustion rule is important to avoid the danger of "piecemeal litigation" that might be presented by cases involving multiple claims, some of which cannot go forward unless they are exhausted and re-filed. That

argument, whatever its merits,[4] has little to do with the present posture of the case, which, after the dismissal of the plaintiff's Eighth Amendment claim, contains a single claim that was fully exhausted. It is no longer a "mixed complaint," and was not when argued and decided by the court below. Petitioners' argument is entirely academic in a case like this one where the unexhausted claim is now out of the case and incapable of being reinstated.

Indeed, although Petitioners changed their position during oral argument, their appellate brief had conceded that, on the facts of this case, resolution of the question they now present to this Court was unnecessary. Again, their brief stated (at 29):

> In the typical case, application of the total exhaustion rule would mandate dismissal of a plaintiff's entire action, unless the plaintiff chose, as he should be allowed to do, to withdraw all unexhausted claims with prejudice. But here, plaintiff has conceded that his only remaining claim (his Eighth Amendment claim) is without merit. *See* Appellant's Br. at 17-18. This concession is tantamount to a withdrawal with prejudice.

Petitioners' initial view was correct: This case presents an inappropriate vehicle for resolving the question presented in the

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[4] *See* Point III.B, below.

petition.[5]

For Petitioners' argument to make any difference here, it would have to be the case that if an unexhausted claim *ever* appeared in a complaint–even if immediately withdrawn, or filed by a *pro se* litigant and withdrawn upon counsel's appearance–no corrective action could avoid dismissal. Petitioners cite no support for such an extreme position, which is directly contrary both to the federal judicial policy of freely allowing complaints to be amended, Fed.R.Civ.P. 15(a), and the leniency given to *pro se* litigants[6] to correct legal errors. *See, e.g., Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 n.2 (7th Cir. 1996).

For these reasons, review of the "total exhaustion" question should await a case that actually contains exhausted and unexhausted claims and presents a factual setting suitable for consideration of Petitioners' arguments.

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[5] What is more, Petitioners conceded the very point of law for which they now argue in this Court: that "application of the total exhaustion rule would mandate dismissal of a plaintiff's entire action, unless the plaintiff chose, *as he should be allowed to do,* to withdraw all unexhausted claims with prejudice." Br. of Defendants-Appellees at 29 (emphasis supplied).

[6] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* at 28-29 and Table 6 (n.d.) (finding that 96% of prisoner litigants proceed *pro se*).

III. THE DECISION BELOW WAS CORRECT.

A. The plain language of 42 U.S.C. § 1997e(a) does not support a total exhaustion rule.

The Prison Litigation Reform Act prescribes in detail when prisoner cases must be dismissed: when an action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from an immune defendant. 42 U.S.C. § 1997e(c)(1). A claim that is subject to dismissal under § 1997e(c)(1) may be dismissed without having been administratively exhausted. 42 U.S.C. § 1997e(c)(2).

As the court below observed, "section 1997e(c), which addresses 'dismissals' of some such suits by prisoners–and is therefore the place where we would expect to find guidance as to whether dismissal of 'mixed' actions is required–is silent on the issue." App. 18a (footnotes omitted). Where Congress has explicitly addressed the subject of dismissal and, more specifically, the relationship between dismissal and exhaustion, it makes no sense to infer another command, not found in the statute, that exhausted claims must be dismissed by virtue of their presence in a complaint with unexhausted claims. *Cf. Original Honey Baked Ham Co. of Georgia, Inc. v. Glickman*, 172 F.3d 885, 887 (D.C.Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list.") In the absence of statutory direction, the "fundamental procedural norm [is] that when a complaint has both good and bad claims, in the sense of claims that can and claims that cannot survive a motion to dismiss . . . only the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of

that, and we find none." *Robinson v. Page,* 170 F.3d 747, 748-49 (7th Cir. 1999) (Posner, J.).

Moreover, 42 U.S.C. § 1997e(c)(2) belies Petitioners' statutory language argument. That section provides for dismissal *on the merits* of individual claims that are unexhausted. If Petitioners' total exhaustion theory were correct, the presence of any unexhausted claim would require dismissal of the whole action for non-exhaustion, making § 1997e(c)(2) superfluous. *See Duncan v. Walker,* 533 U.S. 167, 174 (2001) (disapproving statutory interpretations that render provisions superfluous).

Petitioners assert that in using the word "action" in § 1997e(a) instead of "claim," Congress meant that all claims should be exhausted before an action is commenced. Pet. at 10. But no one disputes that. The question is what to do about a complaint that is partially noncompliant, and the statute is silent on that subject. As the court below stated, "we do not think that it follows that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety–to kill it rather than to cure it." App. 17a.

Petitioners cite *McNeil v. United States*, 508 U.S. 106 (1993), which holds that a Federal Tort Claims Act (FTCA) suit must be dismissed if the plaintiff exhausted administrative remedies only after filing suit. Pet. at 12. *McNeil* is irrelevant because there is no indication that any part of that case had been timely exhausted, or that the Court would have required dismissal of any timely exhausted claims. In fact, practice under the FTCA is to dismiss only claims that are unexhausted

and allow exhausted claims to go forward[7]–precisely the holding of the court below. Similarly, in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court held that the pre-filing notice requirement of the Resource Conservation and Recovery Act of 1976 was mandatory, and a post-filing notice could not prevent dismissal. As in *McNeil*, there was no suggestion that timely notice had been given as to any claim in the case, and therefore no ruling on the instant question, whether a partially compliant suit must be dismissed in its entirety.[8]

B. A total exhaustion rule does not serve the PLRA's purposes better than the dismissal of unexhausted claims.

The purpose of the PLRA exhaustion requirement, to "reduce the quantity and improve the quality of prisoner suits" by "afford[ing] corrections officials time and opportunity to address complaints internally" before suit is filed, *Porter v.*

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[7] *See, e.g., Palay v. U.S.*, 349 F.3d 418, 425-27, 434 (7th Cir. 2003); *Kennedy v. Mendez*, 2004 WL 2301917 at *6 (M.D.Pa., Jan. 15, 2004), *report and recommendation adopted as modified on other grounds*, 2004 WL 2280225 (M.D.Pa., Oct. 7, 2004).

[8] Nothing in the decision below is inconsistent with *McNeil*'s and *Hallstrom*'s holding that prerequisites to suit must be satisfied before suit is filed. Mr. Ortiz's due process claim, which will go forward under the Second Circuit's decision, was successfully exhausted before suit was filed. App. 5a.

Nussle, 534 U.S. 516, 524-25 (2002), is served by the holding below that unexhausted claims must be dismissed while exhausted ones go forward. Under that rule, courts will not hear any claim until prison officials have been given a chance to "address [it] internally" through their administrative remedy system. Prisoners have nothing to gain by filing unexhausted claims that will not be heard, and a rule that requires dismissal and re-filing of *exhausted* claims accomplishes nothing for litigants or the court. Similarly, the concern that an administrative record be made before federal court adjudication, *see* Pet. at 16, is satisfied by dismissing unexhausted claims and allowing only exhausted ones to proceed.

Petitioners' view that prisoners who file unexhausted claims should be sanctioned by having to pay a second filing fee, Pet. 15, finds no support in the PLRA, which addresses filing fees extensively, 28 U.S.C. § 1915(a, b), but says nothing about double filing fees under any circumstances. Moreover, inferring such sanctions as a deterrent is peculiarly inapposite to the mistakes of prisoner litigants, who almost invariably commence their suits *pro se*. Prisoners who purposefully abuse the judicial system, by filing unexhausted claims or otherwise, can be sanctioned through the usual mechanisms of Rule 11, Fed.R.Civ.P., or in extreme cases by limiting their future filings. *See, e.g., De Pineda v. Hemphill*, 34 F.3d 946, 948 (10th Cir. 1994) (per curiam); *Word v. Croce*, 230 F.Supp.2d 504, 514-15 (S.D.N.Y. 2002), *reconsideration denied*, 2004 WL 434038 (S.D.N.Y., Mar. 9, 2004).

Petitioners' concerns about "piecemeal" litigation, Pet.

at 14-17,[9] are misplaced. As the Second Circuit pointed out, App. 28a, the likelihood that claims dismissed for non-exhaustion can be exhausted and re-filed will generally be nil, given the short time limits of prison grievance systems. *See* Br. of ACLU *et al.*, as Amici Curiae in *Booth v. Churner*, U.S. No. 99-1964, 2000 WL 1868111 at *12 n.11 (December 14, 2000) (providing information on grievance deadlines of various jurisdictions, including 14 days in New York, 7 days in Tennessee and Utah, 5 working days in Georgia and Kentucky, and 3 days in Rhode Island and Metro Dade, Florida). Moreover, management of factually related claims is governed by the joinder rules of Federal Rules of Civil Procedure18-21, which are generally permissive, and preclusion rules will prevent relitigation of issues if a party improperly splits claims or defenses. Nothing in the PLRA's text or history suggests any intent by Congress to change those rules. In any case, it is Petitioners' proposal that is certain to result in judicial inefficiency by requiring claims that *have* been properly

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[9] Petitioners' suggestion that prison officials should "have an opportunity to address all related complaints at one time," Pet. at 15, is particularly inapposite in this case, since as they note, the Respondent's complaint about SHU conditions would have required a grievance, while his complaint that the disciplinary hearing officer denied him due process had to be and was pursued through a completely separate disciplinary appeal process. App. 5a; *see Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004) (discussing both processes). Thus, Petitioners' stated goal of considering all related claims together could not be accomplished in this case, where defendants' own system compelled the separation of the two issues.

exhausted to be re-filed and started from scratch.

Defendants finally argue that "total exhaustion provides 'a simple and clear instruction to potential litigants.'" Petition at 17, *citing Rose v. Lundy*, 455 U.S. 509, 520 (1982). But prison administrative remedies are often strikingly unclear;[10] their actual administration often deviates from the formal rules;[11] and prisoners must generally start the administrative process without the assistance of counsel or access to legal advice under very short deadlines. As the Court observed in a different administrative context, "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted

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[10] *See Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004) (noting lack of clear distinction between matters to be raised by grievance and those to be raised by disciplinary appeal); *Hemphill v. New York*, 380 F.3d 680, 689-90 (2d Cir. 2004) (noting unclarity of rules governing expedited grievance process).

[11] *See, e.g., Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (noting defendants' concession that required grievance forms were not made available); *Casanova v. Dubois*, 2002 WL 1613715 at *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (citing evidence that grievance personnel, contrary to policy, refused to process grievances where a disciplinary report had been filed covering the same events).

by trained lawyers initiate the process." *Love v. Pullman*, 404 U.S. 522, 526 (1972). A rule that dismisses exhausted claims along with unexhausted claims is precisely such an inappropriate technicality.

Rose also involved habeas corpus and not prisoners' civil rights litigation. This Court has repeatedly emphasized that habeas and civil rights proceedings are different worlds governed by different rules. *See, e.g., Muhammad v. Close*, 124 S.Ct. 1303 (2004). The Second Circuit cogently rejected the reasoning of those lower courts that have relied on facile analogies to habeas corpus in adopting a "total exhaustion" rule, and Petitioners do not quarrel with that aspect of the decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

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